IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4056 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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M S RAGHUNATHAN

Versus

RAEJSH SHAH & CO

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Appearance:

1. Criminal Misc.Application No. 4056 of 2002

MR JITENDRA MALKAN for Petitioner No. 1

MR PM THAKKAR SR. ADVOCATE WITH MR JIGAR P RAVAL for Respondent No. 1

MS. MITA PANCHAL APP for Respondent No. 2 - State.

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CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 03/09/2004

ORAL JUDGEMENT

1. By means of filing instant petition under Section 482 of the Code of Criminal Procedure ('the Code' for short), the petitioner against whom Criminal Case bearing No.324 of 2001 is filed in the Court of learned Chief Judicial Magistrate, Vadodara for alleged commission of offence under Section 138 of the Negotiable Instruments Act, 1981 ('the Act' for short) in which process has been issued, has prayed to quash and set aside the complaint and the process issued thereunder, on the grounds stated in the petition.

2. The petitioner is the original accused No.7 whereas respondent No.1, a Proprietary Concern, is the original complainant in the above referred to Criminal Case. Therefore, for the sake of convenience and brevity, the petitioner is referred to as "accused No.7" whereas respondent No.1 is referred to as "the complainant" hereinafter in this judgment.

3. As per the averments made in the complaint bearing Criminal Case No.324 of 2001 filed in the Court of learned Chief Judicial Magistrate, Vadodara, the complainant is a proprietary concern running in the name and style of Rajesh Shah & Co, dealing in the business of purchase and sale of shares as per oral or telephonic instructions issued from its customers. Brijlaxmi Leasing & Finance Limited, a company registered under the Companies Act, is accused No.1 ('accused company' in short) in the said complaint whereas accused Nos.2 to 6 are the Directors of the said Company and accused No.7 (the present petitioner) is the Manager and authorised signatory to sign cheque on behalf of the Company). Accused Nos.2 to 7 are engaged themselves as full time Directors and Manager and running the administration of the company jointly. All the accused are customers of the complainant and they used to sell and purchase shares through the complainant company.

4. As per the further averments made in the complaint, there was an outstanding amount of Rs.94,50,852.75 Ps. due and payable by the accused company to the complainant as on 30.5.2000. In part of the discharge of the said payment, the accused had given cheque bearing No.085685 dated 30.5.2000 for an amount of Rs.4,61,875/- drawn on Centurion Bank Limited, Alkapuri, Vadodara in favour of the complainant. On presentation of the said cheque with HDFC Bank where the complainant is having an account, it returned the same on 31.5.2000 with an endorsement that there was no sufficient fund in the account of the accused. The said intimation was received by the complainant on 1.6.2000. Since there was

good relations between the complainant and the accused company and still there was outstanding dues of the accused company payable to the complainant to the tune of Rs.89,50,852.75 it was agreed between them to present the said cheque at any time again. Thereafter the transaction was continued between both of them. The complainant again presented the cheque on 30.11.2000. The said cheque was returned on 1.12.2000 with the endorsement that there was no sufficient fund in the account of the accused company. Therefore, as per the averments made in the complaint, the amount of Rs.4,61,875/- is outstanding from the accused company payable to the complainant and the cheque issued in favour of the complainant was dishonoured, all the accused have committed offence under section 138 of the Act.

5. In order to comply with the provisions of section 138 of the Act, the complainant has issued notice on 12.12.2000 which was served upon the accused company on 13.12.2000 to which the accused company and all other accused through their advocate have given evasive and false reply on 25.12.2000. Therefore, the complainant was compelled to file the complaint against all the accused for alleged commission of offence under section 138 of the Act after complying with the requisite provisions of the Act.

6. On presentation of the said complaint, on 25.1.2001 the learned Chief Judicial Magistrate, Vadodara recorded verification of the complainant and thereafter issued summons which has given rise to the present petition at the instance of the original accused No.7.

7. By filing instant petition, accused No.7 has inter alia stated that the complaint in question is an abuse of the process of the Court as the learned Chief Judicial Magistrate has no jurisdiction, authority or competence to take cognizance against accused No.7 as the complainant has never served upon accused No.7 the notice, which is a condition precedent before taking cognizance of an offence punishable under Section 138 of the Act. It is further stated that facts of the present case do not attract provisions of section 138 of the Act. It is stated by accused No.7 that on hearing of the returning of the cheque in question, BrijLaxmi Leasing & Finance Limited, a company incorporated under the Companies Act, had immediately drawn a fresh cheque of the same amount with a covering letter stating that a fresh cheque is being remitted for payment of the amount of the cheque returned by the bankers and the complainant

has already received the subsequent cheque issued by the accused company and that the accused company have already paid the amount of the cheque so returned. The cheque in question is therefore not for the discharge in whole or part of any debt or other liability. Therefore it is stated that since the complaint is an abuse of process of law, deserves to be quashed by allowing the petition. It is therefore urged to allow the petition.

8. The petition is hotly contested by the complainant by filing reply affidavit inter alia stating that on a clear reading of the complaint which is impugned in this petition, it clearly discloses commission of the penal offence and therefore it is not a fit case for exercise of powers under section 482 of the Code. It is also stated that the matter is at the stage of recording evidence and therefore at this stage it will not be proper for the complainant to state anything on facts since it is likely to be misutilised during the trial proceedings by the accused. So far as the contention with respect to non-service of notice is concerned, it is stated that once the company has been served with a notice, on correct interpretation of the provisions of the Act, accused No.7 becomes automatically answerable for the offence committed by the company by virtue of the fact that he was the manager and an authorised signatory to the cheque which has been returned. It is also stated that there are sufficient averments made in the complaint to make him answerable for the said offence when offence is committed by the company and once the company has been served with the notice, no separate notice is required to be served upon accused No.7. With regard to the second contention of accused No.7 that "on hearing of the returning of the cheque in question, Brij Laxmi Leasing & Finance Limited, had immediately drawn a fresh cheque of the same amount with a covering letter stating that a fresh cheque is being remitted for payment of the amount of the cheque returned by the Bankers. It is denied that the complainant has already received the subsequent cheque issued by the accused company and since the complainant has been already paid the amount of the cheque so returned, the cheque in question is therefore not for the discharge in whole or part of any debt or other liability. It is further submitted that the contentions made in para 5 of the petition to the above effect are denied as they are absolutely false and incorrect. It is also stated that no elaborate reply is made since this contention is in the nature of defence of the accused No.7 against the charges levelled against him in Criminal Case No.324 of 2001 which is pending for adjudication and

trial before the learned Chief Judicial Magistrate, Vadodara. It is submitted that it is for accused No.7 to lead his defence before the learned Chief Judicial Magistrate, Vadodara to adjudicate upon the said defence when accused No.7 chooses to lead the same before the said Magistrate. It is also submitted that such defence cannot be led before this Court in a quashing petition. It is also stated that as and when accused No.7 chooses to lead such defence, the same will be dealt with in accordance with law to point out that the defence is wholly wrong and imaginary. It is also reiterated that it is not open for accused No.7 to lead his defence in this quashing petition. It is not open for accused No.7 to dispute the facts alleged in the complaint in a quashing petition. Lastly it is submitted that the petition lacks merits and deserves to be dismissed with cost and it is therefore urged to dismiss the petition.

9. It may also be noted that accused No.7 has also filed affidavit in rejoinder wherein pronouncements of the Supreme Court on the statutory provisions contained in the Act have been reproduced and, therefore, it is not required to be mentioned here at this stage to burden this judgment.

10. Mr. Malkan, learned advocate of accused No.7 has raised following three contentions:

(i) That accused No.7 has not been served with notice under section 138 of the Act which is a statutory requirement to file complaint against him and, therefore, the complaint is bad for non-issuance of the notice to accused No.7.

(ii) On returning of the cheque bearing No.085685 for an amount of Rs.4,61,875/- on account of not having sufficient fund in the account of the accused-company, it immediately sent a fresh cheque No.069609 dated 1.6.2000 for Rs.4,61,875/= drawn on State Bank of India, Sayajigunj Branch, Vadodara in lieu of the earlier cheque No. 085685 dated 31.5.2000 for Rs.4,61,875/- with a request to accept the fresh cheque and return earlier cheque with a covering letter dated 1.6.2000 and since the complainant has accepted the fresh cheque, as per the contents of the letter, the complainant ought to have returned the earlier cheque No.085685 dated 31.5.2000 but the complainant did not return the said cheque and it again presented the same cheque for encashment after expiry of period of six months

and, therefore, there was no existing debts or liability at the time of presentation of the cheque. This is a matter of document and therefore no evidence is required to be led in this connection. On this ground also filing of the complaint by the complainant is sheer abuse of process of Court.

(iii) As per the statutory provisions contained in Section 138 of the Act, a cheque must have been presented within a period of six months. However, in instant case, the cheque was drawn on 30.5.2000 which was for the second time presented for encashment in the bank on 30.11.2000. Therefore, since the cheque was presented after expiry of six months, by virtue of clause (a) of Section 138, the complaint filed against accused-company is time barred.

11. To bring home the aforesaid submissions, Mr. Malkan, learned advocate of accused No.7 has placed reliance on statutory provisions contained in the Act as well as following reported decisions:

(i) Bharatbhai K. Patel v. C.L. Verma (Since Decd.) through P.O.A. Surjit Singh Macker and another, 2002 (2) GLR 1713;

(ii) Shri Ishar Alloys Steels Ltd., v. Jayaswals NECO Ltd., AIR 2001 SC 1161.

12. On aforesaid premises, it is urged that this petition is required to be allowed by quashing and setting aside the criminal complaint being Criminal Case No.324 of 2001 and the process issued thereunder by the learned Chief Judicial Magistrate, Vadodara and it is prayed to allow the petition.

13. In counter submission, Mr. P.M. Thakkar, learned Senior Advocate appearing for the complainant has contended that in view of the statutory provisions contained in the Act as well as the principles enunciated by the Supreme Court and this Court, no individual notice is required to be given to all the partners, directors and authorised signatories of the drawer company. Notice to the company would amount to service of notice to all the partners, directors and authorised signatories of the company. In instant case, notice dated 12.12.2000 under Section 138 of the Act has been served by the complainant through its advocate on the accused company which has also been replied by the accused company and other

accused and, therefore, it is wrong to contend that accused No.7 was not served with notice under section 138 of the Act.

13 (i) So far as the legal submission with respect to presenting the cheque within six months as envisaged under sub-clause (a) of section 138 of the Act is concerned, Mr. Thakkar has submitted that it is settled principle of law that the date on which the cheque was presented has to be excluded as per the mode of computation provided in General Clauses Act, 1897 and therefore admittedly in the present case, the cheque which was drawn on 30.5.2000, was presented for the second time on 30.11.2000 and thus it is clear that the cheque was presented within the period of six months as envisaged under sub-clause (a) of Section 138 of the Act.

13 (ii) Lastly it is contended that so far as issuance of fresh cheque in lieu of the earlier cheque bearing No.085685 is concerned, it is a false statement made by accused No.7 because he has neither produced any proof with regard to sending a letter dated 1.6.2000 enclosing fresh cheque No.069609 drawn on State Bank of India, Sayajigunj Branch, Vadodara in lieu of the earlier cheque bearing No.085685 which was returned requesting to return the cheque No.085685 and it is a matter of appreciation of evidence by way of defence. It is settled principle of law that in quashing petition, defence raised by the petitioner by way of annexures annexed with the petition cannot be considered and it is for the trial court to decided the said defence.

14. In support of the aforesaid contention, Mr. Thakkar has placed reliance on following decisions:

(i) Bhavesh Bharatbhai Mehta and others v. State of Gujarat and another, 1999 (2) GLR 1323.

(ii) M.M.T.C.Ltd. and another v. Medchl Chemicals and Pharma (P) Ltd., and another, (2002) 1 SCC 234.

(iii) Saketh India Ltd., and others v. India Securities Ltd., (1999) 3 SCC 1.

(iv) Jasbir Singh v. Lt. Governor, Delhi and another, (1999) 4 SCC 228.

15. On aforesaid premies, it is contended that accused No.7 has filed vexatious petition only with a view to delay the trial of the Criminal Case No. 324 of

2001 which is pending in the Court of learned Chief Judicial Magistrate, Vadodara, since 2001 and therefore the petition deserves to be dismissed. He has also urged that while rejecting this petition appropriate direction may be given to the learned Chief Judicial Magistrate, Vadodara to expedite the trial of the said case and dispose it of as early as possible.

16. Ms. Mita Panchal, learned APP appearing for respondent - State has supported the submissions advanced by Mr. PM Thakkar, learned Senior Advocate of the complainant. According to her, the petition lacks merit, therefore, deserves to be dismissed. She, therefore, urged to dismiss the petition.

17. This Court has considered the rival submissions advanced by the learned advocates appearing for the parties and statutory provisions contained under the Act and the decisions cited at the bar.

18. Before dealing with the submissions posed for consideration of this court, it would be worthwhile to notice the object and reason which prompted the Legislature to introduce section 138 in the Act.

19. The Act was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheque due to insufficiency of fund in the account of the drawer of the cheque. This provision was incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument.

20. The Supreme Court has noticed the object of section 138 of the Act in Goaplast Pvt. Ltd. v. Shri Chico Ursula D'Souza and another, AIR 2003 SC 2035 and has held in para 3 of the reported decision as under:

> "...For appreciating the issue involved in the present case, it is necessary to refer to the object behind introduction of Chapter XVII containing Sections 138 to 142. This Chapter was introduced in the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (Act 66 of 1988) with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions and in order to promote efficacy of banking operations. With the policy of liberalisation

adopted by the country which brought about increase in international trade and commerce, it became necessary to inculcate faith in banking. World trade is carried through banking operations rather than cash transactions. The amendment was intended to create an atmosphere of faith and reliance on banking system. Therefore, while considering the question of applicability of Section 138 of the Act to a situation presented by the facts of the present case, it is necessary to keep the objects of the legislation in mind. If a party is allowed to use a cheque as a mode of deferred payment and the payee of the cheque on the faith that he will get his payment on the due date accepts such deferred payment by way of cheque, he should not normally suffer on account of non payment. The faith, which the legislature has desired that such instruments should inspire in commercial transactions would be completely lost if parties are as a matter of routine allowed to interdict payment by issuing instruction to banks to stop payment of cheques. In today's world where use of cash in day to day life is almost getting extinct and people are using negotiable instruments in commercial transactions and plastic money for their daily needs as consumers, it is all the more necessary that people's faith in such instruments should be strengthened rather than weakened. Provisions contained in Sections 138 to 142 of the Act are intended to discourage people from not honouring their commitments by way of payment through cheques. It is desirable that the Court should ban in favour of an interpretation which serves the object of the statute. The penal provisions contained in Sections 138 to 142 of the Act are intended to ensure that obligations undertaken by issuing cheques as a mode of payment are honoured. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. A cheque is a well recognised mode of payment and post-dated cheques are often used in various transactions in daily life. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of post-dated cheque. If stoppage of payment of a post-dated cheque is permitted to take the case out of the

purview of S.138 of the Act, it will amount to allowing the party to take advantage of his own wrong.

21. In light of the objects of the legislation, the question posed for consideration will have to be answered.

22. The object of the legislature is to enhance credibility of the instrument as well as to inculcate faith in the efficacy in banking operation. The negotiable instrument should inspire faith in commercial transaction. This faith would stand destroyed if parties to the negotiable instrument are permitted to play fraud. It is common knowledge that people are using the instrument in commercial transaction postdated cheques and therefore provisions of section 138 of the Act should be interpreted in a manner which discourages people from not honouring the commitment by way of payment through cheque.

23. In aforesaid backdrop of the object of introducing Section 138 in the Act as canvassed by the Supreme Court in above referred to judgment, now let us examine the settled principles enunciated by the Supreme Court on the law of quashment of complaint in a petition filed under section 482 of the Code or under Article 226 of the Constitution of India.

24. It is settled principle of law that exercise of power under Section 482 of the Code is the exception and not the rule. The Section does not confer any new powers on the High Court. It only saves the inherent power with the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the Section which merely recognizes and preserves inherent powers of the High Courts. All Courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a

wrong in course of administration of justice on the principle quando lex aliquid alique concedit, conceditur et id sine quo res ipsa esse non potest (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the Section, the Court does not function as a Court of appeal or revision. Inherent jurisdiction under the Section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the Section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone Courts exist. Authority of the Court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the Court has power to prevent such abuse. It would be an abuse of process of the Court to allow any action which would result in injustice and prevent promotion of justice. In exercises of the powers Court would be justified to quash any proceeding if it finds that initiation or continuance of it amounts to abuse of the process of Court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the Court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

25. In R.P. Kapur v. State of Punjab, AIR 1960 SC 866, the Supreme Court summarised following categories of cases where inherent power can and should be exercised to quash the proceedings:

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g., want of sanction;

(ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

26. In dealing with the first category, the contention that notice as required under Section 138 of

the Act has not been served upon accused No.7 which is a statutory requirement under the Act and, therefore, the complaint filed against accused No.7 is not maintainable, is misconceived in view of the settled principles enunciated by this Court in Bhavesh Bharatbhai Mehta's case (supra). In the said case, this Court has interpreted Section 138 of the Act with regard to service of notice to the registered firm. In the said case notice was served upon the firm which was the drawer of the cheque and not upon all the partners. In the said fact situation, this Court has held that the Legislature had no intention to make it obligatory to give individual notice to every person in charge of or persons who may be responsible to the company for the conduct of its business. A person in charge of and responsible to the company for the conduct of its business is presumed to have knowledge about the day-to-day business of the company. He is supposed to be well-informed about the day-to-day transactions of the company and is not permitted to plead ignorance in respect of such matters. The Legislature, therefore, in its wisdom has made it obligatory upon the complainant to make demand for payment of the cheque alone and no person other than the drawer of the cheque is required to be given notice under Section 138 of the Act.

27. Applying the principles laid down by this Court in above referred to judgment to the facts of the present case, admittedly notice was served upon the drawer, i.e., the accused company by the complainant through its lawyer on 12.12.2000 which was also replied by the accused company and other accused through their advocate on 21.12.2000 raising frivolous defences and, therefore, the contention that the complaint is not maintainable without service of individual notice to accused No.7 has to be repelled and accordingly it is repelled.

28. It is also contended by Mr. Malkan, learned advocate of accused No.7, that in view of clause (a) of Section 138 of the Act, cheque has to be presented within a period of six months from the date on which it is drawn or within a period of its validity whichever is earlier. To reiterate the aforesaid point, Mr. Malkan, learned advocate of accused No.7, has submitted that the cheque No.085685 was drawn on 30.5.2000 and it was once presented and returned and thereafter it was again presented for the second time on 30.11.2000 and therefore counting the period from 30.5.2000 to 30.11.2000 the cheque is presented after expiry of the period of six months and therefore bar contained under sub-clause (a) of section 138 of the Act would be attracted and

therefore the complaint is not maintainable.

29. Mr. Thakkar, learned senior advocate for the complainant, has submitted that it is true that there is bar contained under clause (a) of Section 138 of the Act, but the said bar cannot be attracted in the facts and circumstances of the present case. According to him, the day on which the cheque is presented shall have to be excluded in computing the period of six months and, therefore, this contention lacks merit, must be rejected.

30. To resolve the controversy raised by learned advocates of the parties in respect of this contention, it would be advantageous to refer to the decision of the Supreme court in the case of Saketh India Limited (supra). In the said case, similar controversy with respect to interpretation of Section 142 (b) of the Act had arisen before the Supreme Court which is a statutory provision for filing complaint within a period of one month from the date of arising of the cause of action under sub-clause (c) of section 138 of the Act. While interpreting the said clause, the Supreme Court after referring to General Clauses Act, 1897 has held that in computing the one month limitation period under section 142 (b) of the Act for filing complaint against the drawer, the date 15.10.1995, i.e., the date on which the complaint was filed in that case, has to be excluded.

31. Applying the principle laid down by the Supreme Court in above referred to judgment to the facts of the present case, there is no dispute that the cheque was drawn on 30.5.2000 which was for the second time presented in the bank for encashment on 30.11.2000 and therefore obviously in computing the period of six months the said date i.e., 30.11.2000 has to be excluded and therefore it cannot be said that the complaint is not maintainable in view of the bar contained under clause (a) of section 138 of the Act and therefore the second contention raised by Mr. Malkan is also devoid of any merit and deserves to be rejected and accordingly it is rejected.

32. The third and last contention which has been raised by Mr. Malkan is that the accused company have sent fresh cheque No.069609 dated 1.6.2000 for Rs.4,61,875/- drawn on State Bank of India, Sayajigunj Branch, Vadodara in lieu of earlier cheque No.085685 with a request to accept the fresh cheque and return earlier cheque vide covering letter dated 1.6.2000 but the complainant has never returned the earlier cheque to the

accused company and after accepting and encashing the fresh cheque, the earlier cheque No.085685 was also presented after six months for encashment which was obviously not honoured and encashed as there was no existing debt or liability at the time of presentation of fresh cheque and therefore the complaint is not maintainable.

33. In this connection, it is required to be noted that this contention raised by accused No.7 is in the nature of defence which cannot be examined in a quashing petition filed under section 482 of the Code. Besides this, it may be noted that the accused company sat silent for a period of six months though the earlier cheque No.085685 was not returned to it. It has never inquired or never raised demand for returning the said cheque for a period of six months. Besides this, as per the averments made in the complaint, there was an outstanding amount of Rs.94,50,852.75 Ps. in connection with various transactions between the parties payable by the accused company to the complainant. Therefore, it is very difficult to come to the conclusion that the fresh cheque issued by the accused company was issued in connection with what transaction and it is a matter of appreciation of evidence which cannot be decided in this petition which can be conveniently and judiciously decided during the course of trial. It is settled principle of law that for quashment of complaint in exercise of jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process no doubt should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the Section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death.

34. By relying upon the decision of learned Single Judge of this Court (Coram: C.K. Buch, J.) in Bharatbhai's case (supra), Mr. Malkan, learned advocate of accused No.7, has, with all vehemence at his command, tried to convince this Court that since fresh cheque No.069609 was issued vide covering letter dated 1.6.2000 requesting to accept the same and return earlier cheque

No.085685 which was not returned and the complainant has presented the fresh cheque which was accepted and encashed, there was no existing debt or liability at the time of presentation of the earlier cheque No.085685 and in that view of the matter, the complaint which is impugned deserves to be quashed.

35. It is true that in Bharatbhai's case (supra), the learned Single Judge of this Court has held that where the drawer of the cheque was able to show to the Court that there was no existing debt or liability at the time of presentation of the cheque for encashment on the basis of the conduct of the complainant or admissions made by the complainant that may be in other legal proceedings, then in such cases, the proceedings can be terminated and the accused should not be asked to face the trial till it is concluded.

36. According to this Court, the judgment relied upon by Mr. Malkan, learned advocate of accused No.7 is not applicable to the facts of the present case. In Bharatbhai's case (supra), the learned Single Judge has held that if on the basis of the conduct of the complainant or admissions made by the complainant, may be in other legal proceedings, that there was no existing debt or liability at the time of presentation of the cheque for encashment, then in such cases, the proceedings can be terminated. In instant case, there is no admission on the part of the complainant with regard to non-existence of debts or liabilities at the time of presentation of the cheque for encashment. On the contrary, on having bare look at the complaint, an averment is made that there was existing liability of Rs.94,50,852.72 Ps. as on 30.5.2000 and in discharge of that part of the liability, a cheque bearing No.085685 for Rs.4,61,875/- was drawn by the accused company in favour of the complainant. Moreover, reliance placed by Mr. Malkan on the letter dated 1.6.2000 will have to be proved by accused No.7 during the course of trial. In this quashing petition the said letter has not been admitted by the complainant and without recording the evidence the said letter cannot be proved and therefore it is a question of appreciation of evidence during the course of trial. Besides this, there is no specific averment or pointed denial on the part of accused No.7 either in the petition or in the affidavit in rejoinder about the liability of Rs.94,50,852.75 Ps. as on 30.5.2000 due and payable to the complainant by the accused company. Therefore, this fact of non-existing debt or liability will have to be proved during the course of trial which is not the function of the Court

exercising the powers under Section 482 of the Code. Therefore, judgment in Bharatbhai's case (supra) relied upon by Mr. Malkan, learned advocate of accused No.7, is distinguishable as facts in Bharatbhai's case (supra) are different from the facts of the present case. In instant case, there is no admission on the part of the complainant nor the conduct of the complainant is such from which inference can be drawn that there is no existing debt or liability.

37. At this stage, it is also relevant to note in this connection the judgment of the Supreme Court in M.M.T.C.'s case (supra). In paragraph 17 of the said judgment, the Supreme Court has observed as under:

> "There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the part of respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability."

38. In view of the settled principles enunciated by the Supreme Court in above quoted paragraph which has become law of the land and has a binding precedent, there is no manner of doubt that there is no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability is on accused No.7. Accused No.7 has to discharge this burden in the trial and merely on the basis of averments made in the petition with the annexures, the High Court should not conclude that there was no existing debt or liability.

39. In aforesaid view of the matter, the last contention of Mr. Malkan that fresh cheque was issued in lieu of earlier cheque and inspite of the fact that the fresh cheque was encashed, the old cheque was not returned and the said cheque was again for the second time presented for encashment and thereafter on the allegation of dishonour of the said cheque the complaint is filed which is nothing but an abuse of process of Court is also a defence and it is a matter of appreciation of evidence during the course of trial. It

is very difficult to come to the conclusion as to whether the fresh cheque was issued in connection with which transaction because as per the averments made in the complaint there were transactions between the parties to the tune of Rs.94,50,852.75 Ps.

40. Seen in the above context, none of the contentions advanced by Mr. Malkan in support of the case for quashment of the complaint and the process issued thereunder merits consideration. Therefore all the contentions raised by him deserve to be repelled by this Court while rejecting the petition.

41. For the foregoing reasons, the petition fails and accordingly it is dismissed. Rule is discharged. Interim relief granted at the time of issuance of rule shall stand vacated.

42. At this stage, Mr. Malkan, learned advocate appearing for accused No.7, urges that accused No.7 is desirous of approaching higher forum and, therefore, interim relief granted at the time of issuing rule which has remained operative till today may be extended for a further period of six weeks to enable him to approach the higher forum. The prayer made by Mr. Malkan is opposed by Mr. Thakkar, learned Senior Counsel appearing for the complainant.

43. This Court has considered the prayer made by Mr. Malkan, as well as the objection raised by Mr. Thakkar. It may be noted that the complaint is pending since 2001. This Court has considered all the contentions advanced by the learned advocates appearing for the parties in great detail and at great length with regard to the challenge made against the complaint and process issued thereunder which are impugned in this petition and after considering the impugned complaint, and other papers as well as catena of decisions of the Supreme Court and this Court on the question of quashment of complaint, this Court has recorded categorical finding that complaint and the process issued thereunder cannot be quashed and, therefore, has rejected the petition. Therefore, according to this Court, granting of the prayer made by Mr. Malkan, the learned advocate of accused No.7, would run counter to the settled principles enunciated by the Supreme Court as well as this Court with regard to quashment of complaint and hence the prayer made by Mr. Malkan cannot be entertained and deserves to be rejected and the same is accordingly rejected.

44. Since the complaint is pending since 2001, the

learned Chief Judicial Magistrate, Vadodara, is directed to expedite the trial of the Criminal Case No. 324 of 2001 pending before him and shall dispose it of within six months from the date of receipt of the writ of this Court.

(A.M. Kapadia, J.)

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(karan)